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IN THE

Supreme Court of the State of Delaware

ACE AMERICAN INSURANCE COMPANY, *et al.*, Defendants Below/Appellants, v. RITE AID CORPORATION, *et al.*, Plaintiffs Below/Appellees.	**No. 339, 2020** COURT BELOW: SUPERIOR COURT OF THE STATE OF DELAWARE, C.A. NO.: N19C-04-150 EMD [CCLD] **PUBLIC VERSION FILED:** February 19, 2021

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NATURE OF PROCEEDINGS

This insurance coverage case arises from lawsuits filed by government entities against the insured, RiteAid, seeking reimbursement for certain public budgetary impacts of the opioid crisis. RiteAid's coverage complaint alleges that Chubb and other insurers owe a duty to defend and indemnify RiteAid against the lawsuits. Chubb and RiteAid each moved for partial summary judgment on issues concerning Chubb's alleged duty to defend. The Superior Court denied Chubb's motion and granted RiteAid's, ruling that Chubb owes a duty to defend lawsuits by two Ohio counties—Summit and Cuyahoga (the "Counties"). *See* Exhibit A ("Op."). This Court accepted Chubb's application for interlocutory appeal.

SUMMARY OF ARGUMENT

RiteAid has been sued by various government entities alleging that its distribution of highly addictive opioids created and perpetuated the nationwide opioid crisis. But the lawsuits do not allege that RiteAid's conduct injured any particular opioid users, nor do they seek compensation for any such injuries. The governments instead want RiteAid to help defray the costs of simply *being a government*, i.e., providing various public services to address the multifarious consequences of opioid abuse. RiteAid, in turn, wants to transfer the costs of these novel suits onto its traditional liability insurance policies.

Those policies have no application. As relevant here, they cover only suits seeking compensation for "bodily injury." They do not cover suits seeking compensation for purely economic losses, let alone suits seeking supplemental financing for government operations, even if those operations relate to bodily injuries in some way. These and other clear coverage limitations are essential to the sound underwriting and pricing of liability insurance, as courts have consistently recognized in a variety of contexts. The Superior Court failed to enforce those limitations here in four respects.

1. An insurer must defend its insured only when a complaint seeks damages that would be covered by the insurer's policy. In relevant part, the 2015 Chubb Policy at issue here provides coverage only for suits seeking damages "for" or

"because of" "bodily injury." Under the language, law, and logic of liability insurance policies, coverage depends on the injury suffered *by the plaintiff* (or in a representative-type suit, the party whose claim the plaintiff asserts). If the plaintiff seeks compensation only for its own non-derivative economic harms, there is no coverage, even if those harms bear some "causal connection" to bodily injuries suffered by others. Because the Counties seek compensation solely for economic harms—i.e., increased budgetary line items allegedly connected to the opioid crisis—there is no "bodily injury" coverage for their suits.

2. Assuming the Superior Court was correct in ruling that Chubb's 2015 Policy was triggered by opioid-related bodily injuries, coverage would then fail because those injuries manifested long before 2015. Under Pennsylvania's "first manifestation" trigger rule, a liability policy does not apply to claims arising from injuries that first manifest before that policy commences. Pennsylvania has recognized only one narrow exception to that rule, applicable only to asbestos-exposure claims, based on the uniquely long latency period of asbestos-related disease. There is no basis for extending it to opioid-related injuries. RiteAid proffered no evidence that opioid-related injuries have a latency period at all, much less one comparable to asbestos-related diseases.

3. Coverage is also precluded by the 2015 Policy's "prior knowledge" clause, which requires RiteAid to prove that it was unaware of bodily injuries

giving rise to coverage before the policy's commencement. The Superior Court erroneously construed the clause as depending on RiteAid's awareness of the Counties' *economic losses*. The clause, however, refers expressly to the insured's knowledge of *bodily injuries*. And RiteAid indisputably was well aware of opioid-related bodily injuries long before 2015.

4. The Superior Court held that RiteAid's costs of defending the Counties' lawsuits exhausted its $3,000,000 "per occurrence" retention, ruling incorrectly that both lawsuits arise from a single occurrence as a matter of law. Under Pennsylvania's "cause" test for determining the number of occurrences, the Counties' "distribution" claims involve multiple occurrences. Establishing exhaustion thus requires RiteAid to introduce evidence establishing how its defense costs were allocated among the occurrences. The Superior Court's separate advisory commentary on whether other lawsuits *not* before the court also arise from the same occurrence was unnecessary and incorrect.

STATEMENT OF FACTS

A. Factual Background

RiteAid asserts that Chubb owes a duty to defend and indemnify RiteAid in more than 1,100 lawsuits related to the opioid crisis. Op. 2-3.

Much of the opioid litigation has been consolidated into federal multi-district litigation ("MDL") and divvied into bellwether "Track One" lawsuits involving claims by government entities, including the two County lawsuits. Op. 5.

The Counties' complaints demand that RiteAid defray the costs of certain public services allegedly provided in response to increased opioid use. They allege that RiteAid committed unlawful acts that "contributed significantly to the opioid crisis by enabling, and failing to prevent, the diversion of opioids," A687, thereby imposing on the Counties increased "expenses for police, emergency, health, prosecution, corrections, rehabilitation, and other services," A711-12, A715-16. These alleged expenses include increased costs for (1) training investigators and first-responders, (2) responding to drug-related crimes, and (3) providing care for children whose parents suffer from opioid-related disability or incapacitation. A363, A366, A368.

Significantly, both Counties specifically state that they do "*not* seek damages for death, physical injury to person, emotional distress, or physical

damages to property." A455, A823 (emphasis added). Their budgetary costs instead constitute harms that are "of a different kind and degree than Ohio citizens at large," "can only be suffered by [the Counties]," and "are not based upon or derivative of the rights of others." A455, A822.

RiteAid itself acknowledged in the MDL proceedings that the Counties assert only "indirect and purely economic injuries," "primarily in the form of increased social spending," and the Counties "cannot recover for these expenditures because they do not constitute an 'injur[y]' to either their 'person or property.'" A1283-84, A1290.

The federal judge managing the MDL proceedings agreed that the Counties "do not seek recovery based on injuries to individual residents," but instead "seek recovery for direct injuries suffered by the Plaintiffs themselves." A1382 (emphasis omitted). Although their recovery may "also tend to collaterally benefit their residents," the judge observed, that collateral effect "does not mean that Plaintiffs seek to litigate on behalf of those residents." *Id.*

Chubb issued 19 policies to RiteAid, covering the years 2000-2001 and 2004-2019. A879-1126. The policies contain materially identical insuring agreements, which provide: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' or 'property damage' to which the insurance applies. We will have the right and duty to defend

the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'personal injury' or 'property damage' to which this insurance does not apply." A1015-16. The policies apply to "personal injury" that "occurs during the policy period" and "is caused by an 'occurrence,'" and they define "personal injury" to include (among other things) "bodily injury," A1020, which means "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time," A1019. Other policy provisions are discussed as relevant in the Argument section.

B. Decision Below

"Of the potentially applicable primary policies, Rite Aid has selected the [Chubb] 2015 Policy to cover its defense." A99. RiteAid accordingly sought summary judgment on the duty to defend only under the 2015 Policy. In addition to the threshold question of whether the Counties' lawsuits seek damages "for" or "because of" bodily injury—the sole issue raised in Chubb's own motion for partial summary judgment—RiteAid's motion raised three other issues of policy interpretation.

1. Damages "For" Or "Because Of" Bodily Injury

On the threshold question, the Superior Court held that the Counties' lawsuits seek damages "for" or "because of" bodily injury because "there is

arguably a causal connection" between "the damages suffered by the governmental entities (money spent on services like emergency, medical care, and substance-abuse treatment)" and "the bodily injury suffered by individuals who became addicted to opioids, overdosed, or died." Op. 32 (quotation omitted). The court thus held that Chubb owes a duty to defend even though the Counties did not sue on behalf of anyone who suffered bodily injuries.

2. First-Manifestation Trigger

Under Pennsylvania's "first manifestation" trigger rule, a lawsuit based on continuing injuries will be covered only by the policy(ies) in effect when the injuries first manifest. Although opioid-related injuries manifested long before 2015, the Superior Court held that the first-manifestation rule does not apply to the Counties' lawsuits, based on a narrow exception Pennsylvania courts have recognized for asbestos cases. Op. 39.

3. Prior Knowledge Of Bodily Injuries

Although the Superior Court ruled that County residents' bodily injuries determine the trigger for coverage, the court looked to the Counties' *budgetary* injuries in analyzing the 2015 Policy's "prior knowledge" provision, which permits coverage "only if … [p]rior to the policy period, no insured knew that the 'personal injury' … had occurred, in whole or in part." A1015. That provision does not apply, the court held, because RiteAid at most knew there was "a risk" that its

conduct could cause "damages to the governmental entities." Op. 41 (quotation omitted). As to the residents' injuries, the court stated that even if "Rite Aid knew it injured certain persons before 2015, this does not necessarily demonstrate that it also knew it injured different persons in 2015." Op. 42.

4. Exhaustion And Number Of Occurrences

Finally, the court addressed exhaustion of the 2015 Policy's $3,000,000 "per occurrence" retention, which precludes payment of defense or indemnity costs for any one occurrence until RiteAid itself pays $3,000,000 in defense or indemnity costs for that occurrence. That retention was exhausted, the court ruled, because the Counties' lawsuits (which led to more than $3,000,000 in defense costs) all arose from a single occurrence. Op. 33.

Although that ruling resolved the exhaustion issue for the Counties' lawsuits, the court issued additional advisory commentary on the question of how many occurrences are implicated by "all 'similar' lawsuits." Op. 33. Without reviewing any complaints in other lawsuits alleging opioid-related injuries, the court declared that all lawsuits "similar" to the Counties' arose from the same common occurrence. Op. 37.

ARGUMENT

I. CHUBB HAS NO DUTY TO DEFEND BECAUSE THE COUNTIES' COMPLAINTS SEEK COMPENSATION FOR ECONOMIC LOSS, NOT FOR BODILY INJURY

A. Question Presented

Do the Counties' lawsuits seek damages "for" or "because of" bodily injury? Chubb preserved this issue at A860-78 and A1254-73.

B. Standard Of Review

Review of all issues is *de novo*. *See ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011) ("We review the Superior Court's grant or denial of a summary judgment motion *de novo*. We also review the Superior Court's interpretation of an insurance contract *de novo*.").

Because Pennsylvania has vastly greater contacts with the parties and policy than Delaware, Op. 25 (comparing contacts), Pennsylvania law would apply in the event of any conflict with Delaware law, *see Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 460 (Del. 2017). This brief accordingly focuses on Pennsylvania law.

C. Merits Of The Argument

In Pennsylvania as elsewhere, an insurer's duty to defend is broader than its duty to indemnify: whereas a duty to indemnify is triggered by payment of claims based on conduct *actually* covered by the policy, a duty to defend arises when claims are "*potentially* within the scope of the policy." *Erie Ins. Exch. v. Moore*,

228 A.3d 258, 265 (Pa. 2020) (quotation omitted). A claim is "potentially" covered if—but only if—the factual allegations within the "four corners" of the complaint would, if proved, establish liability covered by the policy. *Id.*

Chubb has no duty to defend the Counties' complaints because they do not seek "damages" "for" or "because of" "bodily injury," as required for coverage to attach.

1. A Suit Seeking Compensation For Non-Derivative Economic Losses Is Not A Suit Seeking Damages "For" Or "Because Of" Bodily Injuries

Chubb's 2015 Policy provides in relevant part that Chubb will indemnify RiteAid against suits seeking otherwise covered "damages because of 'personal injury' or 'property damage,'" but will have no duty to defend "against any 'suit' seeking damages for 'personal injury' or 'property damage'" not covered by the policies. *See supra* at 6-7. As relevant here, "personal injury" includes "bodily injury." To trigger a duty to defend, then, a lawsuit must seek covered "damages" "for" or "because of" "bodily injury."

Under the policy's language and structure, coverage applies only when the "damages" sought are for or because of "bodily injury" *to the plaintiff*. The "plain meaning" of the term "damages" is "compensation for a loss or injury sustained *by the plaintiff*." *Whole Enchilada, Inc. v. Travelers Prop. Cas. Co. of Am.*, 581 F. Supp. 2d 677, 703-04 (W.D. Pa. 2008) (quotation omitted; emphasis added); *see*

Phillips v. Cricket Lighters, 883 A.2d 439, 446 (Pa. 2005) ("Damages awarded in a negligence action compensate a plaintiff for his or her losses."); BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "damages" as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury"); APPLEMAN ON INSURANCE § 129.2(F) (2d ed.). The interchangeable modifiers "for" and "because of"[1] in turn define the kind of injuries for which compensation must be sought, i.e., compensation only for the plaintiff's "bodily injuries," not for other injuries a plaintiff may assert. This structure makes "manifest" that the policies cover only property damage or bodily injury "sustained *by the complaining party*." *Cty. of Monroe v. Travelers Ins. Co.*, 419 N.Y.S.2d 410, 414 (Sup. Ct. 1979) (emphasis added).

The Counties' lawsuits do not fall within this coverage language because they do not seek compensation for *the Counties'* bodily injuries. Obviously the Counties themselves did not suffer bodily injuries. And all agree that the Counties do not seek compensation on behalf of residents who did. *See supra* at 5-6.

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[1] Some decisions have given these terms distinct meanings, *see infra* at 21-22, but Chubb's 2015 Policy uses them interchangeably in the indemnity and duty-to-defend clauses, and Pennsylvania precedents agree that "because of" entails no broader causal connection than "for," *see Am. & Foreign Ins. Co. v. Jerry's Sports Ctr., Inc.*, 2 A.3d 526, 531 (Pa. 2010) (describing policy that covers damages "because of" bodily injury as covering damages "for" bodily injury); *Telecomms. Network Design, Inc. v. Brethren Mut. Ins. Co.*, 83 Pa. D. & C.4th 265, 268 n.3 (Ct. C.P. 2007).

The Counties seek *only* compensation for their *own economic losses*, i.e., the costs of various public services provided to address the opioid crisis. Those claims belong only to the Counties and could not be asserted by the residents themselves. Indeed, *RiteAid itself* agrees that the Counties seek compensation only for the budgetary impacts of the opioid crisis, not for residents' bodily injuries. *See supra* at 6.

The Superior Court nevertheless held that the Counties' lawsuits trigger Chubb's duty to defend because there is "arguably a causal connection" between the Counties' claimed economic losses and their residents' bodily injuries, in that opioid-related injuries allegedly led to the budgetary impacts the Counties cite. Op. 32. That "causal connection" theory contravenes the language and structure of the policy, which provides coverage only for suits seeking compensation for bodily injuries to the plaintiff (or those he represents), *see supra* at 11-12, as an overwhelming body of precedent recognizes.

Cases in numerous contexts have held that "bodily injury" coverage does not apply when the plaintiff itself suffered only non-derivative economic or non-physical emotional injuries, even when such injuries bear some "causal connection" to bodily injuries or property damage suffered by remote non-parties. For example, decisions in Pennsylvania and elsewhere have addressed liability coverage for suits seeking damages for emotional injuries suffered by plaintiffs

who witnessed deaths of family members. In such "bystander" suits, the plaintiff must prove a "causal link" between her emotional injury and the bodily injury she witnessed. *Sinn v. Burd*, 404 A.2d 672, 678 (Pa. 1979). Yet *none* of the courts in these cases found coverage on the basis of that necessary causal connection. Rather, courts have uniformly examined only whether the *plaintiff's own* emotional injuries qualified as "bodily injuries" for purposes of liability coverage. *See, e.g.*, *Legion Indem. Co. v. CareStat Ambulance, Inc.*, 152 F. Supp. 2d 707, 719 (E.D. Pa. 2001); *Wolfe v. State Farm Ins. Co.*, 540 A.2d 871, 873 (N.J. Super. 1988); *Skroh v. Travelers Ins. Co.*, 227 So. 2d 328, 330 (Fla. App. 1969); *Emp'rs Cas. Ins. Co. v. Foust*, 29 Cal. App. 3d 382, 386-87 (1972); *GEICO v. Enceleweski*, 1995 WL 25427, at *3-4 (D. Alaska Jan. 13, 1995); *State Farm Mut. Auto. Ins. Co. v. Ramsey*, 368 S.E.2d 477, 478 (S.C. App. 1988).

The same principle applies here: it is not enough to say that the Counties' budgetary injuries are causally linked to residents' bodily injuries, just as it is not enough to say that a bystander's emotional injuries are causally linked to a family member's bodily injury. What matters is whether the Counties' *own injuries* qualify as bodily injuries. They do not.

Courts in many other contexts have likewise recognized that liability coverage does not apply to non-derivative economic-loss claims merely because they can be described as causally connected to bodily injuries or property damage

suffered by others. The decision in *Preau v. St. Paul Fire & Marine Insurance Co.*, 645 F.3d 293 (5th Cir. 2011), is illustrative. In *Preau*, the insured—a hospital—misrepresented the job performance of a former anesthesiologist, who then caused bodily injury to a patient in his new job. After his new employer paid the victim's damages, the new employer sued the insured, seeking recovery of its economic loss. Even though the loss was causally connected to the victim's bodily injury, the court rejected coverage because the new employer *itself* "suffered no bodily injury," and thus the suit did not seek "damages for bodily injury." *Id.* at 296-97.

Two Seventh Circuit cases exemplify the same principle. In *Health Care Industry Liability Insurance Program v. Momence Meadows Nursing Center, Inc.*, 566 F.3d 689 (7th Cir. 2009), the insured—a healthcare provider—submitted reimbursement claims for "shoddy" healthcare that caused bodily injuries. *Id.* at 694. The payer sued to recover its payments, alleging that reimbursement was improper given the bodily injuries the provider caused. Despite the causal connection between the payer's economic losses and the bodily injuries, the Seventh Circuit found no coverage because the payer *itself* did not suffer bodily injuries. *Id.* at 695.

The court reached the same result in *Medmarc Casualty Insurance Co. v. Avent America, Inc.*, 612 F.3d 607 (7th Cir. 2010). In *Medmarc*, the insured sold

products that caused harm to certain infants. Other purchasers of the products sued, alleging that the known harms to other infants made their products unusable, causing them to suffer economic losses from their purchases. Despite the causal connection between the plaintiffs' economic losses and bodily injuries to others, the court rejected coverage because the complaint "lack[ed] the essential element of actual physical harm *to the plaintiffs*." *Id.* at 614-15 (emphasis added).[2]

Another court applied the same rule to reject coverage in *Key Custom Homes, Inc. v. Mid-Continent Casualty Co.*, 450 F. Supp. 2d 1311 (M.D. Fla. 2006). In *Key*, the insured was a developer sued by subcontractors for construction debts it could not pay when the not-yet-completed project burned down, eliminating the developer's anticipated revenue. The court held that even though the subcontractors' claims could be "traced" to the property damage, they sought only compensation for their own economic losses and thus did not seek damages "because of" property damage. *Id.* at 1318.

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[2] According to the Superior Court, *Medmarc* differs from this case because the underlying plaintiffs there did not allege bodily injuries to their own children, whereas the Counties here do allege bodily injuries to their own residents. Op. 28. The Counties, however, do not allege bodily-injury claims *on behalf of* their residents. They instead assert only economic-loss claims they allege to be *causally connected* to residents' bodily injuries, just as the *Medmarc* plaintiffs asserted only economic-loss claims causally connected to other children's bodily injuries.

To the same effect is *American States Insurance Co. v. Pioneer Electric Co.*, 85 F. Supp. 2d 1337 (S.D. Fla. 2000). In *Pioneer*, the insured was a general contractor that failed to obtain workers' compensation insurance, forcing a subcontractor to pay for an employee's workplace injury. The subcontractor sued the general contractor, which sought coverage on the ground that the subcontractor's economic loss was causally linked to the employee's bodily injury. The court agreed that the bodily injury did "give rise" to the subcontractor's loss, but it rejected coverage because the subcontractor sought compensation only for the economic loss itself. *Id.* at 1343.

Applying the same principle, courts have rejected "causal connection" coverage theories in "public nuisance" suits seeking compensation for economic losses arguably caused by bodily injuries (and/or property damage) suffered by members of the public. *See TIG v. Andrews Sporting Goods, Inc.*, 2002 WL 1293043, at *4 (Cal. App. June 12, 2002); *Mass. Bay Ins. Co. v. Faber Bros., Inc.*, 2007 WL 1029366, at *3 (D. Ill. Mar. 30, 2007); *Millennium Holdings LLC v. Lumbermens Mut. Cas. Co.*, 2013 WL 12344184, at *4 (Ohio Ct. C.P. Aug. 8, 2013). A Pennsylvania court did the same in *American & Foreign Insurance Co v. Jerry's Sport Center, Inc.*, 2003 WL 25884676 (Pa. Ct. C.P. Feb. 25, 2003), *aff'd*, 852 A.2d 1241 (Pa. Super. 2004). In *Jerry's Sport*, the insured was a gun dealer that allegedly created an illegal gun market. The NAACP sued, alleging that the

dealer's acts caused bodily injuries to its members, but sought as relief only a "fund for the education, supervision and regulation of gun dealers." 2003 WL 25884676. The trial court held—and the intermediate appellate court agreed—that despite the causal connection to members' bodily injuries, the insurer had no duty to defend the gun dealers because the NAACP did not seek compensation for those bodily injuries. *Id.*[3]

Other examples abound. *See, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Ready Pac Foods, Inc.*, 782 F. Supp. 2d 1047, 1056-57 (C.D. Cal. 2011) (rejecting coverage for suit by restaurant chain against insured food supplier for business losses incurred when supplier's contaminated food caused bodily injuries to patrons); *Diamond State Ins. Co. v. Chester-Jensen Co.*, 611 N.E.2d 1083, 1087-88 (Ill. App. 1993) (rejecting coverage for suit by state against HVAC company for economic losses incurred when HVAC system failed, causing bodily injuries to state employees and thereby diminishing their productivity); *Structural Bldg. Prods. Corp. v. Bus. Ins. Agency, Inc.*, 281 A.D.2d 617, 619-20 (N.Y. App. Div.

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[3] In footnoted dicta, the Pennsylvania Supreme Court later described this holding as "suspect," but emphasized that the issue was "not before us for review." *Jerry's Sport*, 2 A.3d at 531 n.4. If coverage was appropriate in *Jerry's Sport*, it would have been because the NAACP was necessarily asserting representative claims *on behalf of* its injured members (otherwise the NAACP lacked standing). Coverage may be available for representative claims in appropriate circumstances, *see infra* at 22-23, but the Counties assert no such claims.

2001) (rejecting coverage for suit seeking compensation for costs claimant incurred to repair property damage suffered by another entity).

On the Superior Court's theory that a "causal connection" between the plaintiff's economic loss and a remote non-party's bodily injury is enough to trigger coverage, the courts in all the foregoing cases should have found coverage. None did.[4]

If coverage did apply in such cases, risks would become far too unpredictable to be underwritten accurately. When coverage is limited to claims that the insured's conduct caused bodily injury or property damage *to the plaintiff*, it is feasible to evaluate the conduct, assess its risk of causing physical harm to persons the conduct will directly affect, and then estimate the risk-discounted costs of damages claims by those persons. By contrast, if courts extend coverage to suits by anyone who claims economic losses resulting from the bodily injuries or property damage, underwriters would need to identify not only the class of persons that might suffer physical harm to themselves or their property from the insured's

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[4] Other hypothetical examples further illustrate the error in the "causal connection" approach. That approach would create "bodily injury" coverage for a suit by a RiteAid employee against RiteAid seeking compensation for overtime hours filling opioid prescriptions for addicts, or a suit by an ambulance provider seeking compensation from a hospital for unpaid emergency ambulance services provided to an opioid addict. There is no precedent finding "bodily injury" coverage applicable to such suits merely because the economic losses they assert are causally connected to bodily injuries suffered by others.

conduct, but *also* the entire universe of *other* persons and entities that could suffer downstream economic losses as a result of such harms. *See Ready Pac*, 782 F. Supp. 3d at 1057 (causal connection theory improperly "expands the coverage of the policy so as to provide coverage for almost any liability where bodily injury is a factor"); *Chester-Jensen*, 611 N.E.2d at 1088 (causal connection theory would improperly "provide coverage for any liability where bodily injury is a tangential factor"). Premiums would have to increase in accordance with the vastly expanded uncertainty—assuming insurance could be priced at all. *See State of La. ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1025 (5th Cir. 1985) ("Serious practical problems face insurers in handling insurance against potentially wide, open-ended liability. From an insurer's point of view it is not practical … to fix a reasonable premium on a risk that does not lend itself to actuarial measurement." (quotation omitted)). The problem is especially acute in this context—if the Superior Court's ruling is correct, insurance companies might ultimately be forced to finance all manner of local government operations, whenever a "causal connection" can be made between budgetary outlays and some harms to persons or property. Given the absence of underwriting and premium payments for "causal connection" liability coverage, recognizing such coverage would create a windfall for insureds and threaten the availability of assets to pay meritorious claims arising from risks subject to reasonable actuarial assessment.

2. Other Opioid Coverage Cases Do Not Support Coverage Here

The Superior Court's "causal connection" theory of bodily-injury coverage has been rejected in numerous other cases involving suits by local governments demanding that defendants defray the budgetary impacts of the opioid crisis. *See Travelers Prop. Cas. Co. of Am. v. Anda, Inc.*, 90 F. Supp. 3d 1308, 1315 (S.D. Fla. 2015) (suit did not seek damages "for bodily injury" where state suffered only economic losses and allegations concerning residents' bodily injuries "merely provide[d] context explaining the economic loss to the State"), *aff'd on other grounds*, 658 F. App'x 955 (11th Cir. 2016); *Cincinnati Ins. Co. v. Richie Enters., LLC*, 2014 WL 3513211, at *5-6 (W.D. Ky. July 16, 2014) (bodily-injury coverage does not apply because "actual harm complained of" is solely "economic loss to the State," despite alleged causal connection to residents' bodily injuries); *accord Cincinnati Ins. Co. v. AmerisourceBergen Drug Corp.*, 2015 WL 13808271, at *2 (Ohio Ct. C.P. Aug. 31, 2015); *Westfield Ins. Co. v. Masters Pharm., Inc.*, 2015 WL 10478081, at *2-3 (Ohio Ct. C.P. Dec. 17, 2015).

Some other decisions in opioid cases have reached the opposite result, but those decisions are either distinguishable, incorrect, or both. The Superior Court relied most heavily on *Cincinnati Insurance Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771 (7th Cir. 2016), but that reliance was misplaced for multiple reasons. First, *H.D. Smith*'s analysis depends on the premise that a policy covering "suits seeking

damages '*because of* bodily injury' … provides broader coverage than one that covers only damages '*for* bodily injury.'" *Id.* at 774. Under Pennsylvania law and the policies here, however, the phrase "because of" does not provide coverage broader than "for"—the terms are equivalent. *See supra* note 1.

Second, *H.D. Smith*'s analysis invokes an inapposite example that, if anything, only confirms the absence of "bodily injury" coverage in government suits like these. According to *H.D. Smith*, if a mother sued to recover costs incurred to care for her son's physical injuries, the suit would be subject to "bodily injury" coverage, and "the result is no different merely because the plaintiff is a state instead of a mother." *Id.* at 774.

The distinction, however, makes *all* the difference: the mother's claim for her son's medical expenses would be purely *derivative* of her son's claim. *See* 57B AM. JUR. 2D, *Negligence* § 1030 (Aug. 2020 update) ("claims for … medical expenses paid on behalf of an injured spouse or child are derivative"). Coverage may apply to a derivative-type suit seeking recovery of expenses paid *on behalf of* a physically injured person, depending on the circumstances of the payment and nature of the relationship. *See*, *e.g.*, *Barnard v. Johnston Health Servs. Corp.*, 839 S.E.2d 869, 872 (N.C. App. 2020) (discussing subrogation rights for payer of

medical expenses).[5] But the Counties here specifically disclaim *any* type of derivative or representative suit seeking compensation for any resident's injuries (presumably to avoid creating collateral estoppel against individual residents' own claims). They instead seek compensation solely for their own independent economic losses—losses that no resident personally suffered or could recover.

The Superior Court also relied on *Acuity v. Masters Pharmaceutical, Inc.*, 2020 WL 3446652 (Ohio App. June 24, 2020), which in turn relied heavily on *H.D. Smith* in finding "bodily injury" coverage for another county lawsuit against a wholesale opioid distributor. *Id.* at *4-5.[6] A Pennsylvania federal court recently relied on *H.D. Smith* and *Acuity* (as well as the decision below) to reach the same result. *See Giant Eagle, Inc. v. AGLIC*, 2020 WL 6565272 (W.D. Pa. Nov. 9, 2020). Both *Acuity* and *Giant Eagle* simply repeat *H.D. Smith*'s "causal connection" analysis, and they are wrong about that analysis for the same reasons *H.D. Smith* is wrong.[7] Significantly, none of these decisions acknowledges the

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[5] The law recognizes a variety of derivative-type claims—where the plaintiff essentially stands in the shoes of the person who actually suffered an injury—such as subrogation, assignment, and representative actions. Nuanced differences among such claims are immaterial here, because the Counties disclaim *any* form of recovery on behalf of injured residents.

[6] The Ohio Supreme Court has granted discretionary review in *Acuity*. *See Acuity v. Masters Pharm., Inc.*, 159 N.E.3d 277 (Ohio 2020) (TABLE).

[7] A New York trial court recently held that an order requiring abatement of a lead-paint public nuisance qualified as "damages because of" bodily injury and

many precedents in "bystander" cases and other contexts holding that "bodily injury" coverage does not apply when the plaintiff suffers only non-derivative economic losses, even if those losses arguably bear some causal connection to bodily injuries suffered by others.

3. RiteAid's Other Arguments Lack Merit

RiteAid below advanced two other arguments the Superior Court did not adopt. Neither has merit.

First, RiteAid contended that Chubb's addition of an express opioid exclusion in its 2018 26 ACE American XSL policy demonstrates that any pre-2018 policies lacking that exclusion must afford coverage for all opioid-related claims. That exclusion has nothing to do with the "causal connection" issue here—it bars coverage even where the plaintiff *himself* suffered bodily injury from opioid use. Yes, it would *also* apply to the Counties' suits, but "liability insurance policies often contain both broad exclusions and specific exclusions that overlap." *Pettit v. Erie Ins. Exch.*, 699 A.2d 550, 555 (Md. Spec. App. 1997). Further, RiteAid's approach would mean that "every insurance company adding a new

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property damage because there was "a connection, however remote," between the abatement costs and non-parties' bodily injuries and property damage. *Certain Underwriters at Lloyds, London v. NL Indus., Inc.*, 2020 WL 7711918, at *17 (N.Y. Sup. Ct. Dec. 29, 2020) (quotation omitted). That "remote causal connection" theory is wrong for the reasons already explained.

provision to a standard policy would risk having the new provision used against it in litigation interpreting previously issued policies." *Atkinson Dredging Co. v. St. Paul Fire & Marine Ins. Co.*, 836 F. Supp. 341, 346 n.13 (E.D. Va. 1993); *see O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 290 (Del. 2001) ("The fact that [the insurer] chose to make a clear policy provision more clear as a remedial measure to this litigation may not be used as evidence of an admission of either ambiguity or acceptance of [the insured's] interpretation of the policy.").

Second, RiteAid contended that coverage for the Counties' suits is compelled by insuring agreement language stating that "[d]amages because of 'personal injury' include damages claimed by any person or organization for care, loss of services or death resulting at any time from the 'personal injury.'" A1016. Under RiteAid's interpretation of the policy, however, that provision is meaningless surplusage, since the policy *already* provides coverage for such claims through the "for" or "because of" language. RiteAid's theory thus violates "the cardinal rule of contract construction that, where possible, a court should give effect to all contract provisions." *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985).

By contrast, under Chubb's interpretation of the policy, the clause has independent meaning: it provides a special timing rule for certain derivative-type claims, such as a parent's claim for her child's medical costs, *see supra* at 22, or a

spouse's loss-of-consortium claim, *see Darr Constr. Co. v. W.C.A.B.*, 715 A.2d 1075, 1080 (Pa. 1998), or a health insurer's subrogation claim for medical expenses paid on behalf of an injured insured, *see Barnard*, 839 S.E.2d at 872. As the clause states, coverage extends only to these narrowly specified economic damages resulting from "*the* 'bodily injury," i.e., from the *same* "bodily injury" for which other damages are sought. For that narrow category of claims, the clause extends coverage to medical-cost and loss-of-service damages "resulting *at any time* from the 'personal injury,'" A1016 (emphasis added), rather than restricting coverage to damages incurred *during* the policy period. The clause certainly does not create coverage for *all* economic-loss claims connected to remote bodily injuries, as RiteAid's theory posits. *See Richie*, 2014 WL 3513211, at *6.

II. PENNSYLVANIA'S FIRST-MANIFESTATION TRIGGER RULE PRECLUDES COVERAGE UNDER THE 2015 POLICY

A. Question Presented

Does Pennsylvania's "first manifestation" trigger preclude coverage under the 2015 policy because the relevant injuries first manifested before 2015? Chubb preserved this issue at A1155-59.

B. Standard Of Review

Review of all issues is *de novo*, applying Pennsylvania law. *See supra* at 10.

C. Merits Of The Argument

1. The First-Manifestation Trigger Rule Applies And Bars Coverage Under The 2015 Policy

Under Pennsylvania's well-established "first manifestation" trigger rule, an insured can seek coverage for claims arising from continuing injuries only under the policy or policies in effect when the injuries first manifest. *See Pa. Nat'l Mut. Cas. Ins. Co. v. St. John*, 106 A.3d 1, 7, 15-23 (Pa. 2014); *Consulting Eng'rs, Inc. v. Ins. Co. of N. Am.*, 710 A.2d 82 (Pa. Super. 1998), *aff'd*, 743 A.2d 911 (Pa. 2000); *D'Auria v. Zurich Ins. Co.*, 507 A.2d 857, 860 (Pa. Super. 1986). Accordingly, if an injury first manifests *before* a policy incepts, that policy will not cover the insured's liability.

Pennsylvania has applied the first-manifestation rule for decades, with only one narrow exception. In cases involving injuries caused by asbestos exposure, the

court in *J.H. France Refractories Co. v. Allstate Insurance Co.*, 626 A.2d 502 (Pa. 1993), adopted a special "multiple trigger" exception, allowing for "bodily injury" coverage based on "the exposure to asbestos or silica, the progression of the disease, and its eventual manifestation." *St. John*, 106 A.3d at 22. This limited exception addresses an asbestos-specific policy concern, *viz.*, that the unusually long latency period of asbestos injuries threatened "en masse cancellation of occurrence-based liability insurance policies," because "the existence and eventual manifestation of latent injury … could be predicted with near certainty." *Id.*

In all other situations involving continuing injuries, Pennsylvania courts have consistently held that so long as there is *some* manifestation—however minor—before the date of the relevant policy, the first-manifestation rule precludes coverage. *See Consulting Engineers*, 710 A.2d at 87-88 (multiple-trigger exception applies only in "cases involving toxic torts," specifically asbestos, based on narrow policy issues raised by such cases). For instance, *D'Auria* applied the rule where the plaintiff's renal failure resulted from ongoing deterioration that started 13 years earlier, concluding that the disease "was first manifested in a way that could be ascertained by reasonable diligence well before any of the three policies took effect," even though it "continually worsen[ed]" during the policy period. 507 A.2d at 862. The court reasoned that the insurer "should not be forced

to defend for an injury which was, at least in embryonic form, reasonably apparent" earlier. *Id.*

The Pennsylvania Supreme Court's decision in *St. John* likewise refused to extend the multiple-trigger exception beyond asbestos cases. *St. John* involved a negligently constructed water supply system that exposed the plaintiffs' dairy cattle to contaminated water over a several-year period. 106 A.3d at 3-4. The plaintiffs argued that because their injury was "continuous" and "progressive," they were entitled under *J.H. France* to recover under all four policies in place during that time. *Id.* at 4-5, 18. The court rejected that argument, emphasizing that the narrow *J.H. France* exception "was predicated in large part on the special etiology and pathogenesis of asbestos-related disease," *id.* at 22 (quotation omitted), which results in a uniquely long latency period, thereby creating the risk that insurance policies would be widely cancelled to avoid the predictable future manifestation of asbestos-related injuries, *see supra* at 28. By contrast, the ongoing damage to the plaintiffs' dairy herd was simply a "continuing" and "progressive" injury without a latency period so long that the insurer could "anticipate a future claim." *Id.* at 23 & n.14.

The same is true here. Under the court's threshold "bodily injury" coverage ruling, *see supra* Part I, the trigger for coverage was the County residents' opioid-related bodily injuries. But unlike asbestos-related diseases, no evidence exists

that opioid-related injuries involve a unique "etiology and pathogenesis" that results in a decades-long period of latent physical injury with no manifestation of the injury. To the contrary, the Counties' complaints allege that opioid-related injuries manifested early on, enough that by the 1990s and early 2000—long before 2015—public-health statistics were showing increased deaths and related public-services expenditures. A146, A359, A369, A491, A700, A708-09, A711-12. Coverage is barred so long as opioid-related injuries manifested before 2015 even "in embryonic form." *D'Auria*, 507 A.2d at 862; *see St. John*, 106 A.3d at 3, 22-24. Such injuries were far more than embryonic long before 2015.

2. The Superior Court's Counter-Arguments Lack Merit

The Superior Court refused to apply the first-manifestation trigger rule for two reasons. Neither has merit.

First, the court invoked *J.H. France*'s narrow asbestos-specific exception, on the theory that opioid-related injuries "may not manifest themselves until a considerable time after the initial exposure causing injury occurs." Op. 39. That exception cannot apply, however, based on mere speculation about an unspecified "considerable time" of latency—after all, *St. John* involved a full year of latency, yet the court still refused to extend the exception outside the asbestos context. *See St. John*, 106 A.3d at 38 n.14 (suggesting same result even if injury "were latent … for a three year period"). *St. John* makes clear that if the exception could *ever*

apply beyond asbestos cases, it would be only where the injury involves a "special etiology and pathogenesis" that creates a unique, decades-long latency period—a period *so* long that injuries become predictable enough for insurers to begin refusing to write coverage so as to avoid an onslaught of liability when the injuries finally manifest themselves. *See supra* at 28. RiteAid adduced no evidence that opioid-related injuries are comparable to asbestos-related diseases in that respect.

Second, the court held that even under the first-manifestation trigger, coverage applies because at least some opioid-related bodily injuries may not have manifested until 2015. Op. 39-40. But especially given the court's conclusion that all bodily injuries involve a single occurrence, *see infra* Part IV, what matters is when the injuries comprising that occurrence *first* manifested. *See supra* at 27-29. *St. John* illustrates the point. There, exposure to contaminated water created injuries in individual cows over a years-long period, and under the Superior Court's logic here, the continued manifestation of the injuries should have triggered policies throughout the period of the injuries. But *St. John* held that only one policy applied—the policy in effect the year the cows' injuries *first* became apparent. 106 A.3d at 22-24. Likewise here, only one policy is implicated—the policy in effect when opioid-related injuries first manifested, which indisputably occurred long before 2015.

III. THE SUPERIOR COURT ERRED IN GRANTING RITEAID SUMMARY JUDGMENT ON THE "PRIOR KNOWLEDGE" REQUIREMENT OF CHUBB'S 2015 POLICY

A. Question Presented

Does RiteAid's knowledge of opioid-related bodily injuries before 2015 preclude coverage under the 2015 Policy's "prior knowledge" requirement? Chubb preserved this issue at A1160-62.

B. Standard Of Review

Review of all issues is *de novo*, applying Pennsylvania law. *See supra* at 10.

C. Merits Of The Argument

The insuring agreement of Chubb's 2015 Policy includes a common "prior knowledge" clause requiring the insured to prove that it lacked any pre-policy knowledge of the bodily injury for which it seeks coverage.[8] This provision differs from the "loss in progress" or "known loss" rule, which is "a separate and distinct defense under Pennsylvania law providing that an insurer has no obligation to defend (or indemnify) a known loss/loss-in-progress that exists prior to a policy's inception date." Op. 40. According to the Superior Court, that separate rule applies only when the insured had knowledge of its "*liability* for the bodily

[8] As relevant here, the clause provides that coverage for defense and indemnity "applies to 'personal injury' … only if … [p]rior to the policy period, no insured … knew that the 'personal injury' … had occurred, in whole or in part." A1015.

injuries." Op. 42 (emphasis added) (alterations and quotation omitted). By contrast, the "prior knowledge" clause applies whenever the insured had knowledge of the *bodily injury itself*, even if the insured was unaware of its potential liability for the injury. *See Clarendon Nat'l Ins. Co. v. Phil. Indem. Ins. Co.*, 954 F.3d 397, 406 (1st Cir. 2020) (rejecting coverage under "prior knowledge" requirement); *Westfield Ins. Co. v. Sheehan Constr. Co.*, 580 F. Supp. 2d 701 (S.D. Ind. 2008) (same), *aff'd on other grounds*, 564 F.3d 817 (7th Cir. 2009).

The "prior knowledge" clause precludes coverage because RiteAid was indisputably aware of opioid-related bodily injuries long before commencement of the 2015 Policy. Any denial of such knowledge by RiteAid only establishes a factual dispute on the issue. *See Tower Ins. Co. v. Dockside Associates Pier 30 LP*, 834 F. Supp. 2d 257, 266-67 & n.16 (E.D. Pa. 2011) (considering evidence outside complaint to determine whether insured satisfied "prior knowledge" requirement). Either way, the Superior Court erred in granting RiteAid summary judgment on the "prior knowledge" requirement.

The Counties' complaints detail RiteAid's knowledge of the opioid-related bodily injuries that, according to the Superior Court, triggered Chubb's duty to defend. They include extensive allegations about RiteAid's knowledge of opioid "oversupply" in the Counties for years before 2015, and its knowledge of the

"devastating consequences … including spiking opioid overdose rates in the community." A337-38. In particular, in September 2006, DEA warned RiteAid that "the illegal distribution of controlled substances has a substantial and detrimental effect on the health and general welfare of the American people." A301-02; *see* A649-50. Again in December 2007, DEA warned RiteAid that it suspended another pharmacy's registration because the continued registration "constitute[d] an imminent danger to the public health and safety." DEA, Revocation of Registration, 72 Fed. Reg. 36487, 36504 (2007) (cited at A302, 650). And in January 2009, RiteAid was investigated and fined $5 million by DOJ for "a pattern" starting in 2004 of "non-compliance with the requirements of the CSA and federal regulations that [led] to the diversion of prescription opioids in and around the communities of the RiteAid pharmacies investigated." A337; *see* A686.

Even apart from these allegations, nobody seriously doubts that RiteAid was well aware of widespread opioid addiction and other alleged bodily harms before 2015—*everyone* was aware of the opioid crisis. RiteAid may deny knowledge of its potential *liability* for those injuries, but what matters under the "prior knowledge" condition is whether RiteAid knew that the *injuries themselves* existed before 2015. *See supra* at 32-33. It certainly did.

The Superior Court did not disagree that RiteAid knew about opioid-related bodily injuries before 2015, but still granted RiteAid summary judgment on the 2015 Policy's "prior knowledge" clause by erroneously focusing on the Counties' economic losses. Quoting the *Acuity* appellate opinion now under review by the Ohio Supreme Court, the Superior Court observed that "it is unclear at this stage in the proceedings whether some of the *governmental entities' damages*, such as increased costs for medical and addiction treatment … were known to [RiteAid] prior to the policy period." Op. 41 (quotation omitted) (emphasis added). The "prior knowledge" clause, however, explicitly focuses on the insured's knowledge of the underlying "personal injury," which in turn is defined as "bodily injury" and "property damage." *See supra* note 8. And under the Superior Court's threshold coverage ruling, the "bodily injuries" that trigger coverage are opioid-related bodily injuries. Those bodily injuries accordingly must be the object of the "prior knowledge" requirement.

To the extent the Superior Court considered RiteAid's prior knowledge of opioid-related bodily injuries, it was only to observe that even if "RiteAid knew it injured *certain* persons before 2015," it might not have known that it "injured *different* persons in 2015." Op. 42. But the Counties' lawsuits do not assert individual bodily injury claims divisible by the years in which they occurred. The Counties instead seek recovery for the budgetary impacts of the opioid crisis *in the*

aggregate, including increased expenditures for police, firefighter, and other public services. And according to both RiteAid and the court, *all* opioid-related bodily injuries constitute a single, integrated occurrence. *See infra* Part IV. It is thus irrelevant whether some of those injuries continued to occur into 2015. What matters is that RiteAid knew about the injuries long before 2015, thereby precluding coverage for the allegedly single occurrence under the "prior knowledge" requirement.

The aggregate nature of the Counties' claims also distinguishes this case from *Seagrave Fire Apparatus, LLC v. CNA*, 2017 WL 2972887 (Pa. Ct. C.P. June 28, 2017), *aff'd*, 188 A.3d 559 (Pa. Super. 2018), which RiteAid cited below. In *Seagrave*, a fire-engine manufacturer sought coverage for individual hearing-loss claims asserted by different firefighters. *Id.* at *1. The court held that a "prior knowledge" provision did not bar coverage where the insured knew about one firefighter's injury but not the others'. *Id.* at *4. As just shown, the Counties here do not assert individual bodily-injury claims, but instead seek relief from the budgetary effects of aggregate opioid-related injuries that RiteAid knew about. The "prior knowledge" provision accordingly bars coverage.

IV. RITEAID IS NOT ENTITLED TO SUMMARY JUDGMENT ON EXHAUSTION BECAUSE IT HAS NOT ESTABLISHED THE ABSENCE OF A GENUINE FACTUAL DISPUTE ON THE NUMBER OF OCCURRENCES

A. Question Presented

Did RiteAid establish the absence of a genuine factual dispute as to the number of "occurrences" with respect to (1) the Track One lawsuits alleging only "distribution" claims, and (2) all other "similar" lawsuits alleging both "distribution" and "dispensing" claims? Chubb preserved this issue at A1147-52.

B. Standard Of Review

Review of all issues is *de novo*, applying Pennsylvania law. *See supra* at 10.

C. Merits Of The Argument

The 2015 Policy has a $3,000,000 "Retained Limit," which is "the most an insured will pay for … [d]amages and Supplementary Payments under Coverage A because of all 'personal injury' … arising out of any one occurrence." A1026. Unless RiteAid proves it has exhausted this Retained Limit through defense costs (which are included among Supplementary Payments), Chubb has no obligation to defend under the 2015 policy.

The Superior Court found the retention satisfied because RiteAid expended more than $3,000,000 collectively defending the Counties' Track One lawsuits. To reach that conclusion, the court ruled that the Track One lawsuits arise from only *one* occurrence, i.e., RiteAid's allegedly improper nationwide "distribution"

of opioids. That ruling is incorrect, or at least premature. But the court did not stop there. Instead, it added extended dicta asserting that separate "dispensing" allegations in "similar" lawsuits also involve the *same* occurrence as the "distribution" allegations. That dicta was unnecessary, premature, and wrong.

1. The Superior Court Erred In Ruling That RiteAid's Allegedly Improper "Distribution" Activities Constitute One Occurrence

Under Pennsylvania law, multiple injuries are deemed to arise from a single occurrence only when the insured proves that there is "one proximate, uninterrupted and continuing cause which resulted in all of the injuries and damage." *Sunoco, Inc. v. Ill. Nat'l Ins. Co.*, 226 F. App'x 104, 107 (3d Cir. 2007) (quotation omitted). This "cause" test "focus[es] on the act of the insured that gave rise to their liability." *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286, 295 (Pa. 2007).

The leading Pennsylvania precedent is *Baumhammers*, which addressed coverage for a claim brought against parents of a mentally ill man who killed five people in one spree. The suit alleged that the parents acted negligently "in failing to remove Baumhammers' weapon and/or alerting the authorities as to his dangerous propensities." *Id.* at 296. Because the parents' failure to act "began the sequence of events that resulted in the eventual injuries," such that all injuries "to the several victims stem[med] from that one cause," the court treated the parents'

"inaction" as a "single act of negligence" that "constitute[d] one accident and one occurrence." *Id.* at 295.

The *Baumhammers* court relied on *Washoe County v. Transcontinental Insurance Co.*, 878 P.2d 306 (Nev. 1994), which involved similar facts. In *Washoe*, the County was sued for negligent licensing of a daycare center where one employee sexually abused multiple children over a three-year period. The children's claims all arose from the same "occurrence" for coverage purposes, the court held, because "each of the separate instances of molestation arises from the same proximate cause vis-a-vis the County: namely, the County's alleged negligence in the process of licensing [the daycare]." *Id.* at 801.

The Superior Court here relied on another Nevada decision with comparable facts. In *Century Surety Co. v. Casino West, Inc.*, 99 F. Supp. 3d 1262 (D. Nev. 2015), a motel sought coverage for a negligence claim arising out of multiple deaths that resulted from negligent actions in the maintenance of pool equipment. The actions combined to "generate[] a lethal amount of carbon monoxide that accumulated in a single place on a specific day—the victims' motel room on April 16, 2006." *Id.* at 1265. In particular, the court emphasized, "the proximity in time and space of the events in this case leads to the conclusion that they comprise a single occurrence." *Id.* Further, the record showed that no single act of negligence "would have produced the necessary amount of carbon monoxide to kill

the victims"—instead, "the interdependence of each cause … produce[d] the fatal conditions at issue." *Id.* at 1265-66.

These cases together exemplify the facts needed to establish that multiple bodily injuries result from "one proximate, uninterrupted and continuing cause." In each case, a limited set of plaintiffs suffered common injuries caused by a specific actor or event, which the insured negligently failed to oversee. And in each case, *all* of the insured's allegedly negligent omissions were necessary to produce the common injurious events.

None of those facts exists here. As to the "distribution" claims, there is no one common injury traceable to a singular, integrated cause with one specific oversight failure. The Counties instead allege various *different* acts and omissions that each *independently* caused oversupply and diversion of opioids in the Counties. For example, RiteAid allegedly caused harms by (1) participating in industry organizations that worked with "Marketing Defendants" (the manufacturers) to devise methods of deceptive advertising (A305, A309); (2) failing to monitor the overall supply chain by gathering large-scale distribution data on a geographic or storewide basis (A299, A319, A330); (3) failing to track and report suspicious individual orders by particular pharmacists (A299, A330); (4) failing to train individual pharmacists adequately (A331); and (5) failing to analyze prescription-filling data in detail (A331-32). Summit further asserts that

national pharmacy retailers and individual pharmacists share responsibility to avoid diversion, A329, meaning that the effects of negligent distribution will vary depending on the conduct of local pharmacists and RiteAid's relationships with them. Summit even alleges harms caused by conduct in *other states*, which had comparatively lax regulation, allowing "prescription tourists" to visit and return to Summit with opioid-related bodily injuries. A339-42. The Counties' complaints do not allege that it was necessary for *all* of these various activities to combine to cause the myriad harms to diverse residents. To the contrary, the complaints indicate that any *one* of RiteAid's various acts or omissions would have caused oversupply, misuse, and consequent bodily injuries.

On the current record, then, there is no basis for concluding as a matter of law that all "distribution" claims involve bodily injuries caused by one proximate, continuing, and uninterrupted cause. In fact, the Superior Court itself did not reach that conclusion. The court instead merely asserted that there is "no dispute" that all "distribution" claims arise from a single occurrence. Op. 33. That assertion is wrong. Chubb explicitly disputed RiteAid's contention that "the improper distribution of opioids somehow involves only one occurrence," arguing that the existing record included "disputed issues of material fact arising from the numerous allegations identifying different and specific actions/omissions by

RiteAid as a wholesale distributor to its own pharmacies." A1152. The Superior Court had no answer.

It was at least premature to rule conclusively that all bodily injuries connected to RiteAid's "distribution" activities arose from one common occurrence. At a minimum, further factfinding is needed to determine the number of occurrences, and hence whether RiteAid exhausted its retention. Under both Pennsylvania and Delaware law, parties and courts may look outside the four corners to determine the number of occurrences. *See, e.g.*, *Zurn Indus., LLC v. Allstate Ins. Co.*, 2018 WL 6065102, at *5 (W.D. Pa. Nov. 20, 2018) (four corners rule inapplicable where "the underlying litigation involves not one, but allegedly 'thousands' of claims against [the insured], making it impracticable for the Court to conduct a literal 'four corners' analysis"); *Valley Forge Ins. Co. v. Nat'l Union Fire Ins. Co.*, 2012 WL 1432524, *1-3, 5-6 (Del. Super. Ct. Mar. 16, 2012) (considering deposition testimony in determining number of occurrences). Chubb was entitled to do so here.

2. The Superior Court Erred In Addressing The Number Of Occurrences In "Similar" Lawsuits Involving Separate "Dispensing" Claims

The Superior Court's ruling that all Track One "distribution" claims arise from one occurrence sufficed to establish exhaustion of RiteAid's retention. The analysis should have stopped there. At RiteAid's invitation, however, the court

proceeded to opine on whether the same occurrence also encompasses *other* lawsuits that supposedly allege "similar and/or consistent claims to the Track One Lawsuits," but also include "dispensing" claims. Op. 33-34. That commentary suffers from multiple defects.

First, the commentary is legally meaningless dicta, i.e., it is a "judicial statement[]" on an "issue[] that would have no effect on the outcome of the case" and thus is "without precedential effect." *In re MFW S'holders Litig.*, 67 A.3d 496, 521 (Del. Ch. 2013) (quotation omitted). RiteAid's partial summary judgment motion raised the "occurrence" issue solely to establish exhaustion of its $3,000,000 per-occurrence retention. A112, A125. RiteAid's principal submission was that its defense of the Track One lawsuits alone established exhaustion because they all arose from one occurrence. A127, A1200. Having agreed with RiteAid's position on that issue, the court had no basis for speculating about other "similar" lawsuits not relevant to exhaustion. "Delaware courts do not render advisory or hypothetical opinions." *XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1217 (Del. 2014).

Second, the Superior Court lacked an adequate factual basis for opining on whether allegations in "similar" lawsuits involve the same occurrence as the Counties' lawsuits. The court had before it *none* of the 1100+ complaints in the other lawsuits. RiteAid proffered the opinion of a so-called "expert"—actually,

RiteAid's own in-house lawyer—who asserted that the lawsuits all involved a single occurrence, but the court did not cite his opinion in this part of its discussion. For good reason: RiteAid's lawyer himself did not read all 1100+ complaints, only a select few. A1170-71. And of course "the rule against legal opinions from experts is clear." *N. Am. Philips Corp. v. Aetna Cas. & Sur. Co.*, 1995 WL 628447, at *3 (Del. Super. Ct. Apr. 22, 1995). It was for the Superior Court, not RiteAid's own lawyer, to assemble and evaluate all the relevant facts and determine whether the claims arise from a single occurrence or multiple occurrences.

Finally, to the extent any ruling is possible absent review of other complaints, the Superior Court erred in holding that unspecified lawsuits asserting distinct "dispensing" claims arise from the same occurrence as the Track One "distribution" lawsuits. Op. 37. That ruling directly contradicts the position RiteAid itself took in the MDL litigation, when the government entities sought to amend their Track One complaints to add "dispensing" claims to the "distribution" claims they originally asserted. In response, RiteAid argued that the dispensing claims "are *new and different claims in every possible respect*—including as a matter of the governing legal obligations and facts at issue." A1304 (emphasis added). In particular, RiteAid explained, the original claims addressed only "the conduct of [RiteAid's] distribution centers in monitoring orders placed by [its] own

pharmacies," while the "dispensing" claims "challenge the conduct of the individual pharmacists … in filling individual prescriptions … on behalf of individual patients." *Id.* Whereas the "distribution claims focused on a handful of distribution centers," the "dispensing claims implicate the work of hundreds of pharmacists at dozens of locations filling innumerable prescriptions written by doctors across the region for any number of patients." A1305. The dispensing claims thus "target the conduct of completely different corporate functions and employees" and "are based on entirely different legal duties." A1301; *see* A1348-49 ("Dispensing related claims are inherently jurisdiction-specific, as they concern particular prescriptions in particular states and can implicate state-specific statutes and legal principles.").

Despite RiteAid's admission that the distribution and dispensing claims are "different," the Superior Court concluded that all such claims arose from the same common occurrence—even without reviewing *any* of the lawsuits asserting "dispensing" claims—on the ground that "*both* the improper distribution and dispensing of the opioids" were necessary causes for all alleged bodily injuries. Op. 37 (emphasis added); *see id.* 38 ("if there had been proper controls in place in either stage the injury could have been prevented"). That ruling makes no sense. The premise of the unamended Track One lawsuits is that RiteAid caused injury solely through improper "distribution" conduct, even without oversight failures in

the "dispensing" process. The court had no basis for asserting that improper "dispensing" constitutes a necessary step in the chain of causation. Likewise, it is equally wrong to pronounce—without citation—that improper "dispensing" would be harmless absent improper "distribution." Obviously, it would depend on the particular facts of a given lawsuit—what specific losses are claimed, how they occurred, what dispensing conduct is alleged, and how it connected to opioid harms in the complaining jurisdiction. Without analyzing each individual complaint asserting dispensing-related injuries, no court can declare broadly that all such complaints necessarily arise from the same occurrence as all distribution-related claims.

CONCLUSION

For the foregoing reasons, the judgment should be reversed, or vacated and remanded for further proceedings.

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CERTIFICATE OF SERVICE

I, Garrett B. Moritz, hereby certify that on February 19, 2021, I caused a true and correct copy of the *PUBLIC VERSION of Appellants' Opening Brief* to be served through File & Serve*Xpress* on the following counsel of record:

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